



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

May 30, 2007 Government Records Council Meeting

Vesselin Dittrich
Complainant
v.
City of Hoboken
Custodian of Record

Complaint No. 2006-145

At the May 30, 2007 public meeting, the Government Records Council (“Council”) considered the May 23, 2007 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian complied with the Council’s April 25, 2007 Interim Order.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of May, 2007

Vincent P. Maltese, Chairman
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 4, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 30, 2007 Council Meeting**

Vesselin Dittrich¹
Complainant

GRC Complaint No. 2006-145

v.

City of Hoboken²
Custodian of Records

Records Relevant to Complaint: Construction files for the properties at 213 Garden Street, 803 Park Avenue, and 86 Monroe Street in Hoboken, New Jersey.

Request Made: July 17, 2006

Response Made: None.

Custodian: Michael Mastropasqua

GRC Complaint Filed: July 30, 2006

Background

April 25, 2007

Government Records Council's ("Council") Interim Order. At its April 25, 2007 public meeting, the Council considered the April 18, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

- 1) The Custodian shall provide access to the requested records, or give a lawful basis for denial. N.J.S.A. 14:1A-5.g.
- 2) The Custodian shall comply with #1 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide confirmation of compliance, pursuant to N.J. Court Rules, R. 1:4-4, to the Executive Director.
- 3) The Custodian's actions, most notably requiring the Complainant to deliver the OPRA request to another department, at which time the Complainant was required to complete additional request forms, appears to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

April 27, 2007

¹ No legal representation listed in the record.

² Represented by Jacqueline Gioioso, Esq. of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

Council's Interim Order distributed to the parties.

May 2, 2007

Custodian's response to the Council's Interim Order. The Custodian, as well as a Secretary, legally certify to calling the Complainant and leaving a message on his answering machine informing the Complainant that the records responsive are available for his review.

May 3, 2007

Secretary speaks with Complainant. The secretary legally certifies that on May 3, 2007, she spoke with the Complainant and informed the Complainant that the records responsive are available for his review.

May 4, 2007

Letter from Custodian to Complainant. The Custodian again informs the Complainant that the records responsive are available for his review. The Custodian sent this letter via fax, regular mail and certified mail. The Custodian provides the GRC with a fax transmittal confirmation, as well as the tracking number for the certified letter.

Analysis

Whether the Custodian complied with the Council's April 25, 2007 Interim Order?

The Custodian and a secretary legally certify to leaving messages on the Complainant's answering machine on May 2, 2007, informing the Complainant that the requested records are available for his review. The secretary additionally certifies that on May 3, 2007, she spoke with the Complainant and informed him that the requested records are available for his review.

The Custodian wrote the Complainant a letter on May 4, 2007 informing the Complainant that the requested records are available for his review. The Custodian sent this letter via fax, regular mail and certified mail. The Custodian provides the GRC with a fax transmittal confirmation, as well as the tracking number for the certified letter.

The Custodian complied with the Interim Order by contacting the Complainant via telephone on May 2, 2007 and May 3, 2007 informing the Complainant that the requested records are available for the Complainant's review. The Custodian further complied with the Order by writing the Complainant a letter on May 4, 2007 informing the Complainant that the requested records are available for his review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian complied with the Council's April 25, 2007 Interim Order.

Prepared By:

Rebecca A. DeVoe
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 23, 2007



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

VINCENT P. MALTESE, Chairman
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INTERIM ORDER

April 25, 2007 Government Records Council Meeting

Vesselin Dittrich
Complainant
v.
City of Hobobken
Custodian of Record

Complaint No. 2006-145

At the April 25, 2007 public meeting, the Government Records Council ("Council") considered the April 18, 2007 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

- 1) The Custodian shall provide access to the requested records, or give a lawful basis for denial. N.J.S.A. 14:1A-5.g.
- 2) **The Custodian shall comply with #1 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide confirmation of compliance, pursuant to N.J. Court Rules, R. 1:4-4, to the Executive Director.**
- 3) The Custodian's actions, most notably requiring the Complainant to deliver the OPRA request to another department, at which time the Complainant was required to complete additional request forms, appears to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2007

David Fleisher, Vice Chairman
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: April 27, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2006-145

v.

**City of Hoboken²
Custodian of Records**

Records Relevant to Complaint: Construction files for the properties at 213 Garden Street, 803 Park Avenue, and 86 Monroe Street in Hoboken, New Jersey.

Request Made: July 17, 2006

Response Made: None.

Custodian: Michael Mastropasqua

GRC Complaint Filed: July 30, 2006

Background

July 17, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant visits the office of the Clerk of the City of Hoboken seeking access to the records referenced above. The Custodian requires the Complainant to complete a separate OPRA request form for each property file to which he was seeking access. The Custodian stamps these OPRA forms and assigns them the log numbers 06-881, 06-882, and 06-884. The Custodian then directed the Complainant to the Construction Official, the holder of the records responsive, to submit the OPRA request. The Office of Construction then requests the Complainant to complete an internal, unofficial records review request form. The Complainant does not fill out the unofficial records review request form as directed.

July 26, 2006

The Complainant returns to the Office of Construction seven (7) business days after the OPRA request was made. The Complainant completes the Construction Official's internal records review request form for each respective property by stamping the form with "see attached OPRA form" and submitting both to an employee (the employee calls the city's attorney, who comes to speak with the Complainant). The Complainant asserts that the City Attorney denies the Complainant access to the requested records.

July 30, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA requests dated July 17, 2006,³

¹ No legal representation listed in the record.

² Represented by Jacqueline Gioioso, Esq. of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

Vesselin Dittrich v. City of Hoboken, 2006-145 – Findings and Recommendations of the Executive Director

- Complainant’s Office of Construction Records Review Request Forms,⁴ and
- Section of transcript from Superior Court case Mason v. City of Hoboken, Docket HUD-L 1227-04 & 5061-04 (2005).

The Complainant asserts that on July 17, 2006 he submitted three (3) separate OPRA requests, as required by the Custodian, for access to construction files for the properties at 213 Garden Street, 803 Park Avenue, and 86 Monroe Street in Hoboken, New Jersey. The Complainant further asserts that the requirement to complete separate forms for each requested record violates OPRA. The Complainant declares that the Custodian directed him to the Office of the Construction Official, as the records responsive are held there.

The Complainant alleges that the Office of the Construction Official required him to complete a form titled “Records Review Request Form.” The Complainant asserts that this form also violates OPRA as it requires the requestor to state his or her purpose of review. The Complainant declares that the City intentionally uses this form to impede and deny access to records and that there is no legitimate reason for the use of such a form. Furthermore, the Complainant alleges that no other Office of Construction in the other municipalities of Hudson County uses such a form. Additionally, the Complainant asserts that the Construction Official testified under oath in the Superior Court Law Division case, Mason v. City of Hoboken, Docket HUD-L 1227-04 & 5061-04 (2005) that the use of this unofficial records review request form has been discontinued.

The Complainant contends that he returned to the Office of the Construction Official on July 26, 2006 with the internal records review request forms signed and stamped with “see attached OPRA form” and attached the completed official OPRA request form for each respective property. The Complainant alleges that by completing the official OPRA request forms and submitting them to the Custodian, who dated and stamped the OPRA forms and also assigned them log numbers, the Complainant believes that he has met his obligations under OPRA. The Complainant declares that upon receipt of the OPRA records request forms, an employee at the Office of the Construction Official called the City’s attorney, who came to speak with the Complainant. The Complainant asserts that the City’s Attorney came to the Construction Office personally to deny the Complainant access to the records responsive on the grounds that the Complainant had not copied, by hand, the information from the official OPRA forms to the unofficial internal departmental forms. The Complainant declares that at this time he informed the attorney of his intention to file a complaint with the GRC and the attorney responded with “knock yourself out.”

August 11, 2006

Offer of Mediation sent to both parties. Both parties agree to mediate this case.

October 6, 2006

Case referred back to GRC from mediation.

November 14, 2006

Request for Statement of Information sent to the Custodian.

³ There are three (3) OPRA forms for three (3) different property files.

⁴ There are three (3) forms, each attached to an OPRA request.

November 21, 2006

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA requests dated July 17, 2006.

The Custodian certifies that he required the Complainant to complete a separate request for each individual file that the Complainant sought to inspect. The Custodian asserts that he implemented his own practice of assigning each request a log number because he receives hundreds of OPRA requests a year. The Custodian alleges that he does this in order to manage record keeping and that this process is essential in maintaining a clear and accurate record of OPRA requests. The Custodian further certifies that he does not have custody of the records responsive and that after the Complainant completed the OPRA request forms the Custodian referred the Complainant to the Construction Office. Finally, the Custodian certifies that the Complainant returned to the Custodian's office and indicated that he was not allowed to inspect the records responsive. The Complainant then left, taking the original OPRA request forms with him.

The Construction Official certifies that he has created his own internal tracking system form for those who seek to review records in the Construction Office. The Construction Official asserts his Records Review Request Form is not intended to replace the City's official OPRA request form but is instead used to verify who has inspected the file, the date of the inspection and the files that were inspected. The Construction Official certifies that on July 26, 2006 the Complainant was asked to complete the internal tracking form, not to merely attach it to the official OPRA form. Lastly, the Construction Official certifies that he did not lie under oath. The Construction Official asserts that no one, including a court, has ever informed him not to use this internal tracking form. The Construction Official further declares that upon advice from Corporation Counsel, he discontinued specifying the reason for review of the file on the form as OPRA does not require the requestor to provide a reason for inspection of public records. Lastly, the Construction Official certifies that he does not require immediate parties, such as developers, to complete these forms. The Construction Official asserts that he does, however, require all other persons to complete the form so that his Department has its own records of what files have been reviewed. Copies of these forms are then provided to the City Clerk who files them with the official OPRA requests.

The Corporation Counsel certifies that on July 26, 2006 an employee from the Construction Office called to inform him that the Complainant had refused to complete the records request form as directed. The Corporation Counsel further certifies that in response to this telephone call he went to the Construction Office in an attempt to resolve the matter. Lastly, the Corporation Counsel certifies that the Complainant's allegation that he personally denied the Complainant access to the files is erroneous and that his comments to the Complainant express his frustration in the face of the Complainant's combative attitude and threats to sue the City of Hoboken.

November 30, 2006

Letter from GRC to Custodian. The GRC confirms a conversation wherein the Complainant expressed his desire to submit a response to the Custodian's SOI.

November 30, 2006

Letter from Custodian to GRC with the following attachments:

- Additional Certification of Corporation Counsel, and

- Additional Certification of Construction Official.

The Custodian submits two additional certifications. The Custodian reiterates that the Complainant left the City Clerk's Office with his OPRA request forms. The Corporation Counsel certifies that the Complainant left the Construction Official's Office with the OPRA request in his hand. The Construction Official also certifies that after a dispute over whether the Complainant needed to complete the records request tracking form, the Complainant left the office without submitting the OPRA requests.

December 11, 2006

Complainant's response to the Custodian's SOI.⁵

The Complainant takes issue with the certifications provided by the Construction Official and Corporation Counsel. The Complainant asserts that because the Construction Official was not present at the time the OPRA request was submitted to his office, the Construction Official cannot make any legal certifications regarding these events. In addition, the Complainant alleges that the internal review form used by the Construction Official violates OPRA because it requires the requestor to provide the purpose of review.

The Complainant also asserts that the certification of Corporation Counsel is false wherein it states that Counsel did not personally deny the Complainant access to the records responsive. The Complainant asserts that Counsel denied the Complainant access to the requested records because the Complainant failed to complete the internal tracking form by hand, rather than attaching said tracking form to the completed OPRA form.⁶

The Complainant requests that the Custodian and/or Construction Official be found to have knowingly and willfully violated OPRA.

December 12, 2006

Letter from GRC to Complainant. The Executive Director explains to the Complainant that the GRC has no authority over whom the Custodian chooses as legal representation, as the statutory function of the GRC is to adjudicate Denial of Access Complaints. The Executive Director goes on to remind the Complainant that all submissions to the GRC must also be copied to the Custodian's Counsel.

December 19, 2006

Letter from Custodian to GRC. The Custodian writes to inform the GRC that the Custodian will be submitting a response to the Complainant's letter dated December 11, 2006.

December 21, 2006

Letter from Custodian to GRC. The Custodian asserts that the Construction Official's unofficial records request form is not used to supersede the City's official OPRA request form. The Custodian further asserts that the Construction Official uses this

⁵ The attachments to the Complainant's response to the SOI are not relevant to the adjudication of this complaint.

⁶ The Complainant also supplies the GRC with information which, he believes, illustrates that the Custodian's Counsel cannot legally represent the Custodian.

internal form to implement OPRA. Additionally, the Custodian asserts that the Construction Official can legally certify to the events surrounding the Complainant's OPRA request, even though he was not present at the time of the request, because the clerk present in the Construction Office reported the incident directly to the Construction Official.

Lastly, the Custodian asserts that the Complainant failed to submit the OPRA requests to the Construction Official. The Custodian alleges that the Complainant himself noted that he left the Construction Office with his OPRA requests, thus failing to submit same to the Construction Official to fulfill. The Custodian declares that there has been no denial of access in this case.

December 31, 2006

Letter from Complainant to GRC. The Complainant again takes issue with the Construction Official's use of an internal tracking form. The Complainant alleges that there is no legitimate or legal basis for imposing the burden of completing the internal tracking form on the requestor. The Complainant also again declares that the internal tracking form requires requestors to state their purpose of review on the form, which is violative of OPRA. Lastly, the Complainant again alleges that contrary to Corporation Counsel's legal certification, Counsel did in fact deny the Complainant access to the records requested, simply because the Complainant refused to copy, by hand, the information on the internal records tracking form.

February 22, 2007

Letter from Complainant to GRC.⁷ The Complainant alleges that because he hand delivered his OPRA requests to the City Clerk, who stamped them as received, he did in fact submit these OPRA requests. The Complainant asserts that the Custodian violated N.J.S.A. 47:1A – 5.g. by not providing the Complainant with a written response granting or denying access, asking for clarification or requesting an extension of the statutory response time within the statutorily mandated seven (7) business days, therefore creating a deemed denial of access to the requested records. In addition, the Complaint references Kushner v. West Milford, GRC Complaint No. 2004-111 (November, 2004), in which the Complainant asserts the Council found that the Custodian could not provide any basis in law or fact to prove that the imposition of a separate request form is permitted under OPRA. The Complainant further alleges that the Custodian informed the Complainant that the requested records would be made available on July 26, 2006.

March 19, 2007

- Letter from Custodian to GRC with the following attachments:⁸
- Time line of events from July 17, 2006 to December 29, 2006,
 - Certification of Custodian, and
 - Certification of Construction Office employee Maria Canonico.

The Custodian disputes the Complainant's assertion that the Custodian stated the records responsive would be available for the Complainant on July 26, 2006. The Custodian points to the Complainant's own Denial of Access Complaint form, wherein the Complainant asserted that there had been no reply to the Complainant's OPRA

⁷ The Complainant attached a certification which references a separate OPRA request not relevant to this Denial of Access Complaint.

⁸ There were additional attachments. However, they are not relevant to the adjudication of this complaint.

request. The Custodian certifies that he did not inform the Complainant that the records responsive would be available on July 26, 2006. The second certification provided was from Maria Canonico, in which she also certifies that she did not inform the Complainant that the records responsive would be available on July 26, 2006.

The Custodian also asserts that the Kushner complaint has no analogy to the complaint now before the GRC.⁹

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

Also, OPRA defines a Custodian as:

“... *in the case of a municipality, the municipal clerk* and in the case of any other public agency, the officer officially designated by formal action of that agency’s director or governing body, as the case may be.” (Emphasis added.) N.J.S.A. 47:1A-1.1

OPRA provides that:

“...A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor...” N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

⁹ Additional correspondence was submitted to the GRC. However, it is not relevant to the adjudication of this complaint.

The Complainant asserts that on July 17, 2006 he submitted three (3) separate OPRA requests, as required by the Custodian, for access to construction files for the properties at 213 Garden Street, 803 Park Avenue, and 86 Monroe Street in Hoboken, New Jersey. The Complainant declares that the Custodian directed him to the Office of the Construction Official, as the records responsive are held there. The Complainant alleges that the Office of the Construction Official required him to complete a form titled "Records Review Request Form."

The Complainant contends that on July 26, 2006 he returned to the Office of the Construction Official with the internal records review request forms signed and stamped with "see attached OPRA form" and was refused access to the records requested.

The Custodian certifies that he did require the Complainant to complete a separate request for each individual file that the Complainant sought to inspect. The Custodian asserts that because he receives hundreds of OPRA requests a year, he has implemented his own practice of assigning each request a log number. The Custodian alleges that this is done in order to sustain manageable record keeping and that this process is essential in maintaining a clear and accurate record of OPRA requests.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant cites Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004) for the proposition that a Custodian cannot require a separate request form under OPRA. In Kushner, the Complainant made an OPRA request for certain records and was told that the Township was developing a protocol for the release of records of that type. Four months after the Complainant's OPRA request, the Custodian sent the Complainant a request form for the records and a release of liability form to be completed. The GRC found that the Township erred in handling the request, and determined that the Township did not provide any basis in law or fact that the special request form and release of liability were permitted under OPRA.

The Complainant's OPRA request was made on July 17, 2006, the day he hand-delivered three (3) separate OPRA request forms to the Custodian. As in Kushner, the Custodian has failed to provide a basis in law or fact that require requestors to fill out separate forms for each record requested. Likewise, there is nothing in OPRA which allows a Custodian's internal agency practice to inhibit a requestor's access to government records. See Joseph Renna v. County of Union, GRC Complaint 2004-136 (August 2005). The Custodian has failed to adhere to the spirit of the law by forcing the Complainant to fill out a separate OPRA request form for each record requested.

Although the GRC routinely recognizes other municipal custodians, such as in the case of a Police Department, OPRA defines a Custodian as the City Clerk (N.J.S.A. 47:1A-1.1). In the complaint now before the GRC, the City Clerk accepted and logged the Complainant's OPRA requests. At that point it became the City Clerk's responsibility to coordinate the municipality's lawful response to the OPRA request. Instead, the Clerk directed the Complainant to the Construction Office, where the records responsive are

kept. In this instance, the City Clerk is the Custodian and as such it was his responsibility to coordinate the municipality's response to the Complainant's OPRA request.

By requiring the Complainant to deliver the OPRA request to another department, at which time the Complainant was required to complete additional request forms for internal tracking, the Custodian placed an undue burden on the Complainant. The Construction Official has violated OPRA by requiring the Complainant to fill out an additional review request form. The Custodian has, therefore, failed to prove that the denial of access to the Complainant was authorized by law. N.J.S.A. 14:1A-6.

Best practices dictates that the Custodian would receive the requestor's OPRA request on one form. The Custodian may then log same as the Custodian sees fit. It would then be the Custodian's, not the requestor's, responsibility to facilitate the fulfillment of such request. Should the Construction Official require an additional form for internal tracking purposes, best practices dictates that the Construction Official, not the requestor, should complete such form.

Whether the delay in response to the records request rises to the level of a knowing and willful violation of OPRA?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law under the totality of the circumstances. Specifically OPRA states:

“...[i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

By requiring the Complainant to deliver the OPRA request to another department, at which time the Complainant was required to complete additional request forms for internal tracking, the Custodian placed an undue burden on the Complainant. The Construction Official has violated OPRA by requiring the Complainant to fill out an additional review request form. The Custodian has, therefore, failed to prove that the denial of access to the Complainant was authorized by law. N.J.S.A. 14:1A-6. The Custodian's actions appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

- 1) The Custodian shall provide access to the requested records, or give a lawful basis for denial. N.J.S.A. 14:1A-5.g.
- 2) **The Custodian shall comply with #1 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide confirmation of compliance, pursuant to N.J. Court Rules, R. 1:4-4, to the Executive Director.**
- 3) The Custodian's actions, most notably requiring the Complainant to deliver the OPRA request to another department, at which time the Complainant was required to complete additional request forms, appears to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Prepared By:

Rebecca Steese
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

April 18, 2007